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No. 71-759

In the Supreme Court of the United States

OCTOBER TERM, 1971

DONALD J. ANGELINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

The Petitioner, Donald J. Angelini, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *John Philip Cerone, Sr., et al.*, Nos. 18551, 18555, 18622, and 18635, was entered on September 15, 1971, but is not yet officially reported. It is printed in the Appendix to this Petition. (App. 1)[1]

JURISDICTION

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on September 15, 1971. (App. 32) A timely Petition for Rehearing was denied on November 9, 1971. (App. 33)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is not Title 18, U.S.C. §1952, as being employed here, an over-broad regulation of First Amendment rights and an ex post facto law in violation of Article 1, Section 9, Clause 3 and Section 10, Clause 1 of the Constitution?

2. When the Government, pursuant to the provisions of 18 U.S.C. §1084(d) directed the discontinuance of petitioner's phone service by the local facility, on grounds which are the essence of the cause at bar and cover the same time period, does not his later prosecution constitute double jeopardy in violation of the Fifth Amendment to the Constitution of the United States?

3. When the Government, in the course of the phone service discontinuance case, called the petitioner (plaintiff therein) as an adverse witness, did not the use of his testi-

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[1] "App. ....." denotes Appendix to this Petition.

mony in the criminal trial violate his privilege against self-incrimination?

4. Do the Fourth and Fifth Amendments allow use as evidence, over objections and motions to suppress, unopened mail seized in March and April, 1968, retained sealed by Federal Agents until shortly before trial in April, 1970, and then opened, without warrant or reason to believe the contents were fruits or instrumentalities of crime?

5. Does a charge brought under 18 U.S.C. §1952 satisfy the Sixth Amendment and Rule 7 of the Federal Rules of Criminal Procedure where it merely alleges that Petitioner, on or about September 25, 1967, at Chicago, Illinois, did use and cause to be used the United States Mail in contravention of cited Illinois Statutes?

6. Is it not clear that the Sixth Amendment and Rule 7 have been violated, where the proof introduced to sustain the charge is that on September 29, 1967, one Harry Levine of Detroit, Michigan forwarded a check of $350.00 to Petitioner at Chicago, Illinois, for which he received A & K sports schedules of football games for the ensuing season, plus news events of various sports?

7. Is not Title 18, U.S.C. §1952 as being employed here, violative of the Tenth Amendment when it expands the State Statute of Limitations, where Illinois Courts have defined its Statutes of Limitations as an amnesty?

8. Does the exception to the hearsay rule within the elastic conspiracy doctrine as heretofore applied in federal trials violate the Sixth Amendment's confrontation clause in the light of recent rulings by this Court on the constitutional right of confrontation and cross-examination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions involved are:

Article 1, Section 8

"The Congress shall have power * * * to constitute Tribunals inferior to the supreme Court;

Article 1, Section 9

No Bill of Attainder or ex post facto Law shall be passed.

AMENDMENT I.

Congress shall make no law * * * abridging the freedom of speech.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath * * *

AMENDMENT V.

* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *

AMENDMENT VI. (1791)

In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; * * *

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

STATEMENT OF THE CASE

The petitioner, Donald Angelini, and five others, including Frank Aureli were indicted and charged with violation of 18 U.S. Code, Section 1952 in that they conspired with each other from June, 1965, to about February 6, 1968, and with certain other unindicted co-conspirators to use interstate facilities to facilitate, permit, manage, establish and carry on an unlawful activity, a gambling enterprise, in violation of the laws of the State of Illinois. (Ill.Rev.Stat., Chap. 38, Secs. 28-1 (a)(1)(2)(5)(10))

In Count II, Aureli was indicted alone but severed from the trial during its course because of emergency surgery.

In Count III, this petitioner was charged with a substantive violation of Title 18, U.S.C. §1952 on the ground that he used the mails to violate Illinois gambling law, and that this act occurred on September 25, 1967.

The trial commenced on April 20, 1967, and on May 8, 1970, the jury found your petitioner guilty as charged. He was sentenced to five years in the custody of the Attorney General and fined $10,000.00.

STATEMENT OF FACTS

What Aureli told Bombacino

Most all of the evidence supportive of the government's case is set out in the Court of Appeals opinion, appended hereto as Appendix "A", at pages 1 to 11.

In summation, the government showed through testimony of witness Louis Bombacino that, commencing in 1965 he had contacted defendant Frank Aureli and then gone to work for Aureli in the taking of gambling bets over the telephone at various addresses in Cook County, Illinois. At various times in 1965 and 1966, Aureli told Bombacino

that they would be moving their location and particularly, in October, 1965, Aureli told Bombacino that he would be working for defendants Angelini and Cortina.

THE A & K LINE

This is most non-controversially defined in *Angelini* v. *Illinois Bell Telephone Co.*, 7 Cir., 418 F.2d 111, a civil action under Title 18, U.S.C., §1084(d). The evidence in that case was substantially duplicated on this trial.[2]

> "For many years, plaintiff Angelini operated a business known as 'Angel and Kaplan Sports News Service' with headquarters on North Clark Street in Chicago. A preliminary activity was to prepare and sell to a group of subscribers, a list or schedule of coming sports events. Each sports schedule has printed boxes left blank allowing for the insertion of other information.
>
> "The practice followed was that shortly before any of the events took place, the subscriber would telephone Mr. Angelini in Chicago. If a caller properly identified himself such as by using a code name or number, either plaintiff or one of his employees would permit the caller to listen to a recorded message which had been prepared either by plaintiff or under his direction." 418 F.2d at 113.

The recorded messages were the A & K Line. The petitioner was a recognized expert in prognosticating point-spreads, possible odds and outcomes of sporting events, including football, baseball, hockey, boxing, and even elections. He has been familiarly referred to as the "Wizard of Odds," the product of colorful news reporting.

While this is concisely put for the purpose of this statement, most of the Government's physical evidence was ob-

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[2] There were thousands of subscribers to the schedules, and about 30 to the "service".

taining in a seizure by warrant of his office, and (but for Bombacino) his "admissions" on the 1084(d) trial regard- the conduct of his business.

BOMBACINO'S DIRECT EVIDENCE RE PETITIONER

Bombacino would pick up the A & K schedules each day from a nearby newsstand, or directly from petitioner's office.

Bombacino also testified that on July 2, 1965 he went to Dominic's Pool Room in the 4300 Block on Madison Street. Either at the apartment or on the way to that address, Frank Aureli told Bombacino that Angelo Kokas had a beef that he was pocketing some bets and that they were going over to the poolroom. When he arrived there, there were present Donald Angelini, Angelo Kokas, Johnny Manzella and Joe Pep (Giancania). There, Donald Angelini told Angelo Kokas that from here on any books for fifty dollars or more he has to call them in to Frank Aureli, and Angelo Kokas said, "Okay, Don, if that is the way you want it." Angelini said, "I know it's hard for you to go back and forth to the phone out at the track."

COUNT III

The evidence on this Count was the mailing of a $350 check by one Harry Levine from Detroit on September 29, 1967 to petitioner.

He testified that the check was for schedules and other news items. The Court of Appeals decided that the jury could have made the mathematical inference that the payment was for getting the "line."

REASONS FOR GRANTING THE WRIT

I. The right to espouse and publish personal opinion is the heart of the First Amendment. The Seventh Circuit decision in *Angelini* v. *Illinois Bell Telephone Co.*, 418 F.2d 111, forbidding his publication of predictions and probable odds only if the transmission is "rapid" (apparently at some undisclosed proximity to the upcoming sporting event) is violative of this Court's decision in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, and many others that regulations involving First Amendment rights be narrowly specified. Further, the speed standard, announced in 1969, was applied criminally for acts and transactions beginning late June, 1965, and concluding in August, 1967, and as such is an ex post facto law in violation of Article 1, Section 9, Clause 3 and Section 10, Clause 1 of the Constitution. These multiple transgressions upon Constitutional protections and guarantees require the intervention of this Court.

II. The law is settled that Title 18, U.S.C., §1084(d) imposes penalties and is quasi-criminal in nature. *Kelly* v. *Illinois Bell Telephone Co.*, affirmed 210 F.Supp. 456, 463, affirmed 325 F.2d 148. The decision of the Seventh Circuit that the execution of those penalties and the imposition of penalties in the later criminal action—based on the same evidence—does not violate the prohibition against double jeopardy is in conflict with this Court's decision in *United States* v. *La Franca*, 282 U.S. 568, and misinterprets its decision in *Helvering* v. *Mitchell*, 303 U.S. 391, 399.

III. The holding of the Seventh Circuit that a person testifying in a quasi-criminal penalty proceeding to es-

tablish his rights or to avoid the penalty, constitutes a waiver of his privilege against self-incrimination as to a later criminal prosecution is contrary to this Court's decisions in *Simmons* v. *United States*, 390 U.S. 377 and *United States* v. *Kordel*, 397 U.S. 1, and is in direct conflict with a decision of the New Jersey Supreme Court in *State* v. *Clark*, 39 LW 2576.

IV. This case presents an unusual question which has not been but should be decided by this Court. Personal, unopened mail has been seized by Government forces, and maintained by them over a period of two years, then to be opened at their leisure and used at their pleasure, without, until their belated opening, suggesting any evidentiary value, and presenting no reason to believe they contained fruits or instrumentalities of crime. The approval of the Seventh Circuit—apparently allowing the procedure because possession was obtained through an earlier valid search—is inconsistent with this Court's decision in *United States* v. *Van Leeuwen*, 297 U.S. 249, and ignores the Fifth Amendment privilege of the petitioner in his private papers, recognized in *Hill* v. *Philpott*, 445 F.2d 144 (now pending before this Court on grant of certiorari as 71-442, 40 L.W. 3134), and *United States* v. *Blank*, N. Ohio, 330 F.S. 783.

V. The charge here was an invitation to the Government to "roam at large" to prove its charge in contravention of this Court's decision in *Russell* v. *United States*, 369 U.S. 749 and *Cole* v. *State of Arkansas*, 333 U.S. 196, and directly conflicts with the decision of the First Circuit in *United States* v. *Tomasetta*, 429 F.2d 978.

VI. Where the proof before the grand jury, if any, is documentary, and demonstrates the poles of activity—Detroit and Chicago—and those poles are not charged and

the date proved conflicts with the charge made, the acceptance of the prosecution of the invitation to roam at large to support its enveloping accusation is demonstrable proof of the inadequacy of the charge. The sanctioning of the indictment by the Seventh Circuit on the basis that a Bill of Particulars will suffice diverts the responsibility of the Grand Jury to the prosecutor in violation of the Fifth Amendment.

VII. Title 18, U.S.C., §1952 has a Congressional purpose of aiding the States in the enforcement of their laws. Where the State of Illinois has characterized its criminal statutes of limitations as an amnesty, and thus clearly substantive, expanding the statute is not in accord with this Court's decision in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 and *Guaranty Trust Company of New York* v. *York,* 326 U.S. 99, and violates the reservation of powers clause of the Tenth Amendment.

VIII. The Court of Appeals has misapplied this Court's decision in sustaining the admission of the Government agent—informer's recital of the co-defendant's statements —in reliance on *Dutton* v. *Evans,* 400 U.S. 74. This decision, further, conflicts with the decision of the Fifth Circuit in *United States* v. *Dobbs,* 448 F.2d 1262.

I.

In April, 1958, this petitioner inaugurated a civil action under the provisions of 18 U.S.C., §1084(d) to forestall the termination of his phone service. The Seventh Circuit ruled against him on the basis that the use of the phones to publish his "line" violated Illinois law.

In the face of a First Amendment plea, that Court held:

> "Ill.Rev.Stats. Ch. 38, § 28-1(a) (10) provides that it is unlawful to transmit by telephone 'information as to wagers, betting odds, or changes in betting odds.'

> In order to avoid applying this statute to information protected by the First Amendment, it has been limited by court decisions to the 'rapid' transmission of either actual wagers, betting odds or changes in betting odds *to* or by persons engaged directly or indirectly in gambling operations, a construction which preserves the freedom of speech but does not hinder the legislative purpose of suppressing gambling." (418 F.2d at 113-4)

That decision was published in November, 1969, as noted hereinbefore. The bulk of the evidence introduced in this case was a repetition of that used in that case.

Again raising the First Amendment plea in this case, this petitioner also contends that the "speed" concept as announced in 1969, admittedly applied to this case involving activities terminating in mid-1967 violates the ex post facto proscription. Of this contention, the Seventh Circuit held:

> "Angelini's final attack on the constitutionality of section 1952 is the assertion that it constitutes an ex post facto law violative of article one, section nine, clause three of the Constitution. The theory of this argument is that section 1952 on its face proscribes the use of interstate facilities in any form in furtherance of gambling, thereby rendering it violative of the first amendment by Angelini's lights; that the statute was not narrowed to constitutionally permissible scope until *Angelini* v. *Illinois Bell Tel. Co.*, 418 F.2d 111 (7th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970), limited its application to rapid transmission of gambling information; and that such limitation did not occur until after the conduct which gave rise to this prosecution had occurred. Taking Angelini's argument at face value, we do not find the limiting construction of section 1952 to be an unreasonable interpretation of the statute which, if such were the case, might provide an arguable basis for his ex post facto law

assertion. *Williams* v. *United States*, 179 F.2d 644, 647 (5th Cir. 1950). 18 U.S.C. § 1952 does not constitute an ex post facto law as applied here." (App. 21)

We submit the Court erred in its application of a not "unreasonable interpretation in applying criminal law. It is not whether the construction is "not . . . . an unreasonable interpretation," it is whether there is undeniable specificity in determining exceptions to First Amendment rights.

> " 'These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [cases cited] Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity. *Cantwell* v. *Connecticut*, 310 U.S. 296, 311' ". *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433.

Any restriction, condition, or reservation which activates the operation of a criminal exception to a constitutionally protected right must be clearly expressed. *Mosley* v. *Police Department of Chicago, et al*, 432 F.2d 1256.

The "not unreasonable interpretation" test may be available for consideration in civil laws, but not in criminal. This Court has so stated in more cases than space will allow detailing, but we shall refer to a few. "No one shall be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *Lanzetto* v. *State of New Jersey*, 306 U.S. 451, 453 ". . . [I]t is reasonable that a fair warning should be given in language the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27. "The

standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness'. Cantwell v. Connecticut; Pierce v. United States. * * * The vagueness may be from uncertainty in regard to persons within the scope of the Act, Lanzetto v. New Jersey, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt". *Winters* v. *United States,* 333 U.S. 507, 515.

It is well established that a "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept that crimes must be defined with appropriate definiteness." *Pierce* v. *United States,* 314 U.S. 306, 311.

But, assuming the decision in this petitioner's §1084(d) case identified him as a person within the scope of the act, that identification cannot be made to relate back five to two years prior to the decision. Just as he who defies an interpreting decision knows precisely what he is doing, *Screws* v. *United States,* 321 U.S. 91, 105, a necessary correlative is that he is not charged with anticipating a limiting decision, and retroactive application for the employment of criminal sanctions is ex post facto.

II.

We submit the Government chose its punishment when it directed the Telephone Company to divest petitioner of the rights to the use of its public utility.

> "While the instant action is a civil proceeding in that plaintiffs seek an injunction, it is perfectly apparent that Section 1084(d) imposes penalties for the violation of law and is in this respect quasi-criminal in nature." *Kelly* v. *Illinois Bell Telephone Co.,* N.D.Ill., 210 F.Supp. 456, 463, affirmed 325 F.2d 148.

See also *Lees* v. *United States*, 150 U.S. 476, and *Trop* v. *Dulles*, 356 U.S. 86, 95.

In this sense it is unlike *Fleming* v. *Nestor*, 363 U.S. 603, where the fact of deportation on a specific ground was sufficient to cut off the right to social security benefits, here the penalty rests on "the operation of the statute on the occurrence of the underlying act", and "Congressional concern was wholly with the acts leading to the penalty," and "not with the fact of" the penalty. (All quotes from 363 U.S. at 620). As such the criminal penalty constitutes an additional penalty based on the same acts.

That prior penalty action is an absolute bar to further punishment of this petitioner in this action under the Fifth Amendment prohibiting double jeopardy. *United States* v. *LaFranca*, 282 U.S. 568, which stands for the proposition that exaction of penalties in a quasi-criminal action and imposition of penalties in a criminal action, based on the same evidence, constitutes double jeopardy.

We submit that the Seventh Circuit's reliance on *Helvering* v. *Mitchell*, 303 U.S. 391, is not appropriate to the circumstances here. *Helvering* v. *Mitchell* had to do with the fifty percent civil penalty imposed upon fraudulently evaded taxes. This was rationalized as not being a penalty, but merely remedial as it served to reimburse the government for the heavy expenses, investigation, and the loss resulting from the taxpayer's fraud. (303 U.S. at 401) We suggest the deprivation of the use of a public utility serves in no way to reimburse the government and cannot be rationalized in the same light that the Supreme Court rationalized in *Helvering*.

We submit that the conviction here should be reversed and vacated as putting this petitioner twice in jeopardy for the same acts.

III.

On September 15, 1969, this petitioner filed a motion to suppress his testimony given in the trial of *Angelini v. Illinois Bell Telephone Company,* stating in said motion as follows: that on March 29, 1968, the agent in charge of the F.B.I. in Chicago communicated with the Illinois Bell Telephone Company and told them that seven of the company's telephones were being used by Angel and Kaplan Sports News Service for the transmission of "wagering information in violation of State of Illinois Statute, Chapter 38, Section 28-10(a)(10) . . ." Two days later the United States Attorney followed up on that letter requesting the telephone service to the premises be discontinued inasmuch as the telephones were being used in violation of the company's tariffs. On April 1, 1968, the phone company wrote to Angel and Kaplan Sports News Service, attaching the two letters, and advising the subscriber that the service would be discontinued as of April 8. On April 3, Mr. Angelini, sole owner of Angel and Kaplan Sports News Service filed a complaint against Illinois Bell Telephone Company seeking an injunction against the company from discontinuing the service as aforesaid. On April 16, 1968, evidence was taken before the Judge of the lower court, and in the course of taking such evidence the United States called this defendant-appellant as an adverse witness under Rule 43(d) of the Federal Rules of Civil Procedure over objection; it was further contended in the motion that such evidence as the United States of America obtained from this defendant as an adverse witness on that trial could not be used against him in this subsequent criminal trial in that it constituted coerced evidence and he was protected by his privilege against self-incrimination. (Doc. 20)

The rejoinder of the United States was a recognition that case law is that the government may not, by means of bringing a civil or administrative proceeding, force a defendant under pressure of losing property rights, to make statements which will be used against him in a subsequent criminal trial. It distinguished, however, on the basis that this petitioner *brought* the civil suit and thus voluntarily entered the suit well-knowing the rules of civil procedure and that once Angelini had filed suit he was properly called to the stand by the Government.[3] Since, said the Government, the petitioner brought the suit, it was not the Government utilizing a civil suit to benefit a criminal case. (Doc. 64) The trial Court, in ruling adopted in substance the government argument and continued that "it would be a strange and unwarranted result if one who illegally uses interstate facilities in aid of racketeering enterprises could insulate himself from criminal prosecution by initiating an action against his telephone company . . ." (Doc. 100, Page 12) "Recognizing the dilemma with which defendant was faced in his civil action, it remains true that he had a legitimate option not to testify on his own behalf. . . ." (Doc. 100, Page 23)

It seems beyond denial that the right of persons to telephone service is a property right within the protection of the Fifth Amendment since a public utility must serve all members of the public without unreasonable discrimina-

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[3] Though the Assistant United States Attorney, upon objection made to calling Angelini to the witness stand for adverse questioning in the civil suit suggested that the fifth amendment was available to him, we submit a real and recognizable danger of having his suit dismissed existed, foreclosing his only avenue of possible relief. See *Stockham* v. *Stockham*, 168 So.2d 320; *Minor* v. *Minor*, 39 L.W. 2263.

tion. (220 F. Supp. at 625-626) It is also beyond denial that only the availability to the subscriber of a forum in which to contest the deprivation of that property right saves the statute from unconstitutionality.[4] However, the dilemma is that property will be taken without due process of law unless the subscriber brings the action insisting upon his due process. The choice boils down to bringing the suit to protect one constitutional right at the hazard of losing another constitutional right. The distinction of the government and of the Courts' rulings are without substance.

If the recourse to the injunction suit is so hazardous, § 1084(d) is unconstitutional as a bill of attainder, which has been defined as a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *The State of Missouri*, 71 U.S. 277, 323; *Inland Steel Co.* v. *N.L.R.B.*, 7 Cir., 170 F.2d 247, 267.

Recently in assessing a similar situation this Court recognized the "undeniable tension" created when one right is set against another right—here the privilege versus the prohibition against property deprivation without due process—and ruled it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 393-4.

Further, we see no distinction between this case, and an even more recent ruling of this Court:

> "We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding

[4] The Fifth Amendment questionability of this Statute (1084(d)) —from its inception in contest—is further aggravated when collateral disadvantages result from making that *demand*.

against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property." *United States* v. *Detroit Vital Foods, Inc.*, 6 Cir., 407 F.2d 570, 575-6; specifically endorsed *United States* v. *Kordel*, 90 S.Ct. 763, 770.

This case is also extremely similar to the case of the New Jersey Supreme Court, *State* v. *Clark*, decided March 22, 1971, 39 LW 2576, where a mother, in order to get welfare assistance for her three illegitimate children, was obliged to bring a bastardy action against the putative father, and was also obliged to name the putative father. Both parties were criminally charged with fornication. The New Jersey Supreme Court held:

> "The law should not allow constitutional rights of the parents to be sacrificed as a condition to gaining public assistance for the children. Penal intrusions of the kind involved here into the law of welfare must be considered restrained by the Fifth Amendment and by our rules of evidence."

IV.

Pursuant to warrants issued raids were made on the premises of Angel and Kaplan Sports News at 236 No. Clark Street, Chicago, Illinois, on March 28 and April 4 of 1968. From these premises a roomful of documents and equipment were taken. (Tr. 729-745; 751-785; 813-847; 881-901)

In the course of that search the agents found what had been marked Government's Exhibit 39. That is described as a letter that was on the top of the middle desk in Room 801 of the above-described premises. The letter was unopened. The witness, Johnson, who seized Government's Exhibit 39 did not open it. Johnson also found

Government's Exhibit 56. This was "discovered" on a large table in the middle of the room. It was an air mail letter addressed to A & K Sports Publications, 236 North Clark Street, Chicago, Illinois. Both were first opened by an agent of the F.B.I. two years later and were admitted in evidence. (Tr. 1045-6; 1842) Objection was made to the introduction of both of these documents. (Tr. 899-900)

We suggest that this Court, in *United States* v. *Van Leeuwen*, 397 U.S. 249, implied that rightful possession[5] will not void Fourth Amendment interest in the privacy of the mail until the approval of a magistrate is obtained. (397 U.S. at 253)

The Seventh Circuit accepted the representation of the Government argument that the contents of Exhibit 39 was not admitted in evidence. We think that acceptance was misplaced. But it nonetheless ruled:

> "Angelini also contends that the seizure of certain unopened mail discovered in his office upon the execution of valid search warrants was illegal. He also contends that the opening of one such envelope addressed to John DiDomenico in care of Angelini's firm and the introduction into evidence of the envelope itself was improper. We determined that the search and seizure was proper in *Angelini* v. *Illinois Bell Tel. Co.*, 418 F.2d 111, 115 (7th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970), when Angelini's counsel specifically raised the issue of the propriety of the seizure of a number of items, including the unopened mail. Angelini cites no convincing reason to disturb that determination, and we shall not do so. His contention

[5] Assuming the validity of the seizure in the first instance, and discerning no distinction between that valid possession and the validity of the post office possession in *Van Leeuwen*.

with regard to the opening of the DiDomenico letter is vague and unpersuasive, especially in view of the fact that the contents of the envelope were not offered in evidence. We find no error." (App. 27)

Thus, the Seventh Circuit avoided the primary issue in reliance on a Government representation.

But no such issue of whether or not the contents were used arises with regard to Exhibit 56. "Special agent Shanahan testified that he had opened the envelope and found that it contained United States currency and a piece of paper upon which was written the words "Oak Park." (Govt. Brief, p. 282)

The opinion, the Court will note, does not address itself at all to this important exhibit (56), about which Agent Shanahan testified at length, relating it to yet other exhibits. Nor does the opinion even mention the opening of these letters two years later for purposes of trial, and rule on the propriety or impropriety of such a practice.

We submit to this Court that the refusal of the Appeals Court to recognize facts and arguments[6] actually void the statutory right of appeal, especially in these days when this Court, overburdened as it is, must of neeessity deny so many petitions for review, and amounts to a deprivation of appellate due process.

We think this Court, in *Van Leeuwen,* clearly iterated its position initiated in *Ex Parte Jackson*, 96 U.S. 727, respecting the reach of the Fourth Amendment to first class mail. See also *Lustinger* v. *United States,* 9 Cir., 386 F.2d 132, 139 and *Oliver* v. *United States,* 8 Cir., 239 F.2d 818, 822-3 respecting the sanctity of unopened mail, even though in

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[6] These omissions were clearly brought to the attention of the Seventh Circuit on Petition for Rehearing.

the lawful custody of another agency of Government, the Post Office Department.

We would also submit that in *Hill* v. *Philpott*, 7 Cir., 445 F.2d 144,[7] the same Court, adopting this Court's reasoning in the great case of *Boyd* v. *United States*, 116 U.S. 616 and *Schmerber* v. *California*, 384 U.S. 757, gave heed to the interrelationship of the Fourth and Fifth Amendments, and recognized that:

> ". . . in any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step in considering a motion to suppress is to determine whether the introduction into evidence of the material seized would violate the Fifth Amendment. This is to be determined by inquiry as to whether the evidence 'relates to some communicative act or writing.' If it does, the search is barred under both Amendments."

This case, and particularly Exhibit 56 presents exactly the same predicament, but aggravated by the opening of the communicative act without warrant. Presenting, as this issue does, important questions of Fourth and Fifth Amendment right, we submit it is not so lightly to be cast aside.

V and VI.

Count III of the Indictment charged that Donald Angelini, on or about September 25, 1967, at Chicago, Illinois,

> "*did unlawfully*, wilfully and knowingly *use and cause to be used a facility in interstate commerce, to wit, the United States mail, with intent to promote, manage, establish, and carry on and facilitate the pro-*

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[7] Pending on grant of certiorari in this Court. See also *United States* v. *Blank*, N.Ohio, 330 F.S. 783, adhering to *Hill* in a §1952 case.

motion, management, establishment and carrying on of an unlawful activity, to wit, a *business enterprise involving gambling offenses, in violation of the laws of the State of Illinois, to wit, Illinois Revised Statutes, Chapter* 38, *Section* 28-1(a) (1), (2), (5) and (10), *and thereafter did perform and attempt to perform acts of promotion,* management, establishment and carrying on of the said unlawful activity:

"In violation of Title 18, United States Code, Section 1952." (Doc. 2)

A motion was made to dismiss the Indictment (Doc. 23), including this Count, challenging its sufficiency, and alleging it violated the Sixth Amendment and Rule 7 of the Federal Rules of Criminal Procedure, and stating particularly as to Count III:

> "12. Count 3 of the indictment is violative of the Sixth Amendment to the Constitution of the United States for failure to advise this defendant of the nature and cause of the accusation against him since it contains no fact allegation but the date and mere identification of the type of interstate facility, and, if allowed to stand, the government could satisfy the indictment's scope in any of an unlimited number of ways, and the defendant has no opportunity to prepare a defense, nor be protected against double jeopardy."

As to the vagueness of the charge, Court of Appeals held:

> "It did omit the opposite pole of the use of an interstate facility, stating only that the United States mail was used 'in interstate commerce' 'at Chicago, Illinois' or or about a certain date. However, the question of the location of the other terminal of the use is in the nature of evidentiary matter to be discovered by a motion for a bill of particulars. *Carbo* v. *United States,* 314 F.2d 718, 731-33 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964). The additional in-

formation desired by Angelini was supplied by the Government in its bill of particulars provided pursuant to his motion. We hold that Count Three of the indictment was sufficient to charge an offense under 18 U.S.C. § 1952." (App. 28)

Of course, this resolution solves nothing. It is beyond cavil that a Bill of Particulars cannot breathe life into a defective indictment. *United States* v. *Comymo,* 248 U.S. 349; *Dunlap* v. *United States,* 165 U.S. 486. It is no answer to the insufficiency of the charge that we seek evidentiary matter. In a way it is true that all indictments plead matters to be proved, and, in that sense, are evidentiary—but, there must be reasonable assurance that the accused is defending against the charge brought by the grand jury. That assurance is singularly missing here.

The mail communication proved was not actually a use of the mails by Angelini at Chicago, Illinois, on September 25, 1967, but was a use originated by one Harry Levine at Detroit, Michigan on September 29, 1967 (Government Exhibit 15), wherein he forwarded a $350.00 check to A & K Sports News in Chicago. Thus does the indictment become more and more vague, for Mr. Angelini becomes not a prime mover, but an aider and abettor of the unnamed principal,[8] on a communication originating in Detroit on September 29, the date of the check, instead of September 25, 1967.

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[8] This we assume is the government theory, for as a result of a mutually casual self-introduction and a discussion of their respective businesses, Harry Levine subsequently received applications for sports publications. See Government Exhibit 42C. Yet this theory loses substance when we consider the government's recognition that "Angelini had a right to publish and ship the schedules in commerce

(Footnote Continued Page 24)

Thus it becomes more clear that under the generalities of the indictment, the government was allowed to prove what the grand jury did not charge. It is inconceivable that the grand jury, having any knowledge of the Levine check, would not know the actual date of its making.

Footnote 8 Continued

. . ." (Govt. Appeal Brief, p. 81) The law seems established to that effect. *United States* v. *Arnold*, 4 Cir., 380 F.2d 366, 367; *People* v. *Galan*, 110 Ill.App.2d 98, 249 N.E.2d 118, 119.

The government's witness Levine testified that, for the $350, he received the schedules plus news events of various sports.

It, thus, appears clear that no crime at all was committed. However, notwithstanding the uncontested evidence of Levine, the Court of Appeals rationalized to a conclusion contrary to that evidence:

> "Angelini's challenge to the sufficiency of the evidence to convict him on Count Three is based chiefly on two theories: that, since the use of the mails was an out-of-state customer's mailing a payment to him, he did not use the mails and that there is no evidence negating the possibility that the payment to Angelini was for printed schedules sold to the general public and not for providing the line. There was evidence before the jury that the customer had paid Angelini $350 for a football season's service and that the printed publication Angelini distributed cost $.25 per copy per week. There was no evidence that the customer subscribed to more than one copy per week; indeed the evidence was that he subscribed for his personal use alone. We believe the jury was entitled to infer arithmetically that much of the $350 fee was for the line provided by Angelini, especially in view of the fact that the evidence established that the customer called Angelini as frequently as a dozen times a week. Therefore, even if we assume that Angelini's printed materials were not prohibited from interstate distribution, the evidence was sufficient to establish that Angelini made use of the mails to distribute the line to his out-of-state customer who also made use of the mails in paying for Angelini's services. The evidence of guilt under Count Three was adequate." (App. 29).

Thus, it is apparent that the grand jury had no knowledge that the mailing at Chicago, Illinois on September 25, 1967 was to be proved by a check mailed at Detroit, Michigan, dated September 29, 1967, and it is equally apparent that they could not charge what they did not know.

This Court has repeatedly emphasized that it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him of a charge that was never made. *De Jonge* v. *State of Oregon*, 299 U.S. 353, 362; *Cole* v. *State of Arkansas*, 333 U.S. 196, 201.

Like the indictment condemned in *Russell* v. *United States*, 333 U.S. 196, the charge made here "left the prosecution free to roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."

The directions of this Court in the foregoing cases, and others, were assiduously followed in *United States* v. *Tomasetta*, 1 Cir., 429 F.2d 978 and in *United States* v. *Critchley*, 3 Cir., 353 F.2d 358, and, thus, this decision is in direct conflict with those circuits.

In *Tomasetta*, the Court recognized the dilemma created by being charged with "making threats by an unstated means to an unnamed person on a particular day in a city of moderate size." (429 F.2d at 979-980) In *Critchley*, a Title 18 U.S.C., §1951 prosecution, the Third Circuit held that proof of threats on October 5, 1962, did not satisfy a charge that they were made on October 7 and 8, 1962.[9]

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[9] The only valid proof before the grand jury would be the Levine mailing of a dated check. Though the indictment charged a violation "on or about September 25," no leeway can be tolerated on this basis, where the evidence is documentary.

This case violates both those principles, which, we submit, should be elementary under the Constitution and this Court's Rules and opinions.

We would suggest a parallel to further demonstrate the illegality of the charge here. The use of the mails is the gravamen of the charge here brought under Title 18, U.S.C., §1952, as it is in every case brought under Title 18, U.S.C., §1341. In the setting of that latter older, more familiar and tried statute, specific description of the mailing is required to be alleged. *United States v. Shavin*, 7 Cir.; 287 F.2d 647, 650. Charges under both statutes being bound by the same Constitutional and procedural protections, no reason suggests itself why less should be tolerated here.

VII.

In stating the purpose of 18 U.S.C., §1952 and its companion statutes, the Congress expressed a purpose of assisting the States in the enforcement of their laws pertaining to gambling, bookmaking and like offenses (U.S. Code Congressional and Administrative News, 1961, P. 2631) The violation punished here is the use of interstate facilities to violate Chapter 38, §28-1(a) (10) Ill. Rev. Stats. Without that state statute there would be no violation of law. The Illinois Statute of Limitations is eighteen months, and clearly punishment for its violation was outlawed in the State. Illinois courts have termed their criminal limitations statutes "a surrendering by the sovereign of its right to prosecute . . . The statute . . . is an amnesty . . ." *People* v. *Jackson*, 178 Ill.App. 35, 156 N.E. 303, 304.

This Court, in the great case of *Erie v. Tompkins*, 304 U.S. 64, recognized a clash with the Tenth Amendment, where the rights to be vindicated in the federal theatre are dependent on State law. Following *Erie* explicitly, this

Court in *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, held that a statute of limitations "that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally . . . ." (326 U.S. at 110).

We submit there is no distinction where entry into the federal forum to vindicate state-created rights based on the statutory availability of those courts derived from Article 1, Section 8 of the Constitution on the basis of diverse citizenship, and a like availability to vindicate state-created penalties, where the entry rests on the Commerce clause.

VIII.

As recognized in the decision of the Court below, the major source of the Government's evidence was Louis Bombacino (an undercover employee of the Government during all of the matters to which he testified) and the major source of his evidence was the statements of Frank Aureli, a co-defendant, which Bombacino testified were made to him concerning the activities of the other defendants, including your petitioner. On the basis primarily of this Court's decision in *Dutton* v. *Evans*, 400 U.S. 74, the Court below endorsed the admission of the evidence Bombacino gave about what Aureli told him.

This case is clearly not controlled by *Dutton*. In that case, in distinguishing *Douglas* (*Douglas* v. *Alabama*, 380 U.S. 415) and *Bruton* (*Bruton* v. *United States*, 391 U.S. 123), the Supreme Court said that *Dutton*, unlike those cases, "does not involve evidence in sense 'crucial' or 'devastating'." Bombacino's evidence was not only crucial and devastating; it is the only evidence. Also contrary to *Dutton*, this case *did* involve a joint trial, and, in that sense, is in a like posture with *Bruton* and *Roberts* (*Rob-*

erts v. *Russell*, 392 U.S. 293). Further unlike *Evans* who was able to call Williams, whom the witness Shaw purported to parrot, but decided not to do so "in the best interest of his client" (91 S. Ct. at 219), Angelini was in no position to call Aureli whom Bombacino purported to parrot, because as he was a co-defendant, he could not as a legal proposition. As a physical reality, Aureli was hospitalized during the trial because of emergency surgery and was unavailable to give testimony, and he was severed out and the trial continued as to the other defendants. It should be noted that both *California* v. *Green*, 399 U.S. 149 and *United States* v. *Griffin*, 434 F. 2d 978, cert. den. sub nom. *Andrews* v. *United States*, 402 U.S. 995 relied upon the availability and presence of the alleged declarant.

Further, Shaw's evidence, in *Dutton* was "of peripheral significance," while Bombacino's testimony was of paramount significance. Without Bombacino, there was no evidence at all.

But there are yet further considerations in the examination of *Dutton*. The Court will remember that it was a five to four decision.

Mr. Justice Blackman who joined the majority, did not join the majority because he thought Shaw's testimony admissible, but because "the claimed circumstances of its utterance is so incredible that the testimony must have hurt, rather than helped, the prosecution's case." (91 S.Ct. at 220) He felt that Shaw's "incredible remark fades into practical and legal insignificance" (91 S.Ct. at 222), and that the error—if any—was harmless beyond reasonable doubt.

Mr. Justice Harlan recognized that the majority rule of *Dutton* is not appropriate to federal prosecution: "Ex-

clusion of such statements, as is done in the federal courts, commends itself to me, but I cannot say that it is essential to a fair trial." (91 S. Ct. at 225)

Of course, the marginal minority (5-4) felt the introduction of the evidence "a clear violation of Evan's constitutional rights."

We submit *Dutton* has no application to the case at bar, and, as Mr. Justice Harlan stated, in federal courts such evidence is excluded.

In *United States* v. *Dobbs*, 448 F.2d 1262, the Fifth Circuit found statements of a co-defendant to a federal agent so clearly inadmissible as not to merit comment.[10] There is no difference between the testimony of Bombacino here (a paid Government agent detailing what a co-defendant told him) and the F.B.I. agent doing the same thing in *Dobbs*.

The decisions are in conflict.

CONCLUSION

Wherefore, this Petitioner respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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EDWARD J. CALIHAN, JR.
Attorneys for Petitioner,
Donald J. Angelini

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[10] The decision merely discounted the excuse of the prosecution that the evidence was brought in for impeachment purposes.



APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

Nos. 18551, 18555, 18622, 18635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN PHILIP CERONE, SR., JAMES CERONE, JOSEPH FERRIOLA, DONALD J. ANGELINI, and DOMINIC CORTINA,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 15, 1971

Before SWYGERT, *Chief Judge*, STEVENS and SPRECHER, *Circuit Judges.*

SWYGERT, *Chief Judge:* These consolidated appeals challenge the validity of judgments of conviction entered upon jury verdicts which found defendants John P. (Jack) Cerone, Sr., Donald J. Angelini, Dominic Cortina, James

Cerone and Joseph Ferriola guilty of conspiring to violate 18 U.S.C. § 1952 in violation of 18 U.S.C. § 371 and which found Angelini guilty of a substantive violation of section 1952 as well. Because the defendants each challenge, inter alia, the sufficiency of the evidence to support their convictions, we shall recite the facts adduced at trial in some detail, viewing the evidence in the light most favorable to the Government as we must.

The major source of the Government's evidence against the defendants was Louis Bombacino, a paid informer who had been involved in the operation of defendants' alleged gambling conspiracy from late June of 1965 until about August of 1967.[1] Bombacino had been a rather unsuccessful criminal for much of his life, alternately attempting mail theft, forgery, robbery, extortion and the confidence game to support himself between the several prison terms he received for his endeavors. In April of 1965 while he was in jail awaiting trial on a state charge of robbery, Bombacino agreed to become an informer. Most of what follows is based upon his testimony.

Prior to the disposition of the robbery charge in September of 1965 (when he was placed on probation for a period of five years) but subsequent to his agreement to become an informer, Bombacino contacted Angelo Kokas, an old friend on June 25, 1965 and, pursuant to their conversation on that date, returned to the MGM Lounge in Chicago at about midnight on the following day. When he arrived, Kokas, Frank Aureli (a defendant as to whom a mistrial and severance were ordered because of his

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[1] Bombacino received slightly in excess of $3000 over the period of 45 months or so during which he served as an informer for the Federal Bureau of Investigation.

sudden illness during the trial), defendant Ferriola, "Turk" Turello and John Varlas were seated together at a table in the restaurant portion of the Lounge. Bombacino went to the table and shook hands with Aureli, who inquired as to whether Bombacino was "going to give up getting [himself] in trouble all the time, back and forth, in and out of jails." Bombacino replied that was the reason he wanted to see Aureli, that he wanted to go to work for him. Aureli then looked at Ferriola, who nodded and told Bombacino: "You go to work for Frank [Aureli], but be careful. There are a lot of G heat on the street."[2]

In accordance with the foregoing conversation, Bombacino went to work for Aureli as an employee of the bookmaking operation conducted out of Aureli's apartment at 4355 South Sawyer. Bombacino's and Aureli's daily activities were essentially the same each day at the Sawyer Street address, except that on Monday mornings Bombacino would go to Johnny Manzella's sausage stand to pick up baseball betting sheets which showed the teams scheduled to play for the week with various columnar rulings which were used to record the pitchers for each team and the "line," that is, odds and point spreads on each game. Except for that Monday variation, each day Bombacino would go to 4355 South Sawyer at about 10 or 11 a.m. The line would be obtained by a telephone call placed by Aureli, and he and Bombacino would then remain at the apartment taking calls from bettors and recording bets until about 4 to 6 p.m. The total of the day's bets taken in by Aureli and Bombacino on June 27, 1965, Bombacino's first day on the job, was about $15,000, the record of which was turned over that evening to Johnny Manzella who was identified as "the boss of the district."

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[2] Bombacino testified that "G heat" meant agents of the Federal Bureau of Investigation.

About July 2, Aureli told Bombacino that Angelo Kokas was pocketing some of the bets he received and that they were going to Domenick's Pool Room. When they arrived at the poolroom at about 1 p.m., defendant Angelini, Kokas, Manzella and Joe Giancanna were already there. The group went into the poolroom section of the establishment (it also had a barber shop and candy counter) where Angelini told Kokas he was to call in all bets of $50 or more to Aureli. Kokas acquiesced without protest, and Aureli then gave Kokas a telephone number, whereupon Aureli and Bombacino departed.

About the middle of October, 1965, Aureli told Bombacino that they would be moving to Maywood, that they would be working for defendants Angelini and Cortina, and that Bombacino would no longer pick up schedules from Manzella. A day or two later, Bombacino and Aureli did move to 321 West Lake Street in Maywood. The location was described as a small store with a barricaded back door, equipped with two telephones and two buckets of water.[3] Bombacino and Aureli operated in the same fashion as before, except that on Monday mornings Bombacino would pick up schedules from the office of Angel-Kaplan Sports News Service (wholly owned by Angelini) at 236 North Clark Street in Chicago and he also drove Aureli to and from the Lake Street location each day. In addition, Bom-

[3] A day or two before the move to the 321 West Lake Street address, Aureli told Bombacino that they would be using dissolvable paper and that he would be picking up such paper at Jack Garber's printing shop. Garber testified that he had printed columnar and horizontal lines on such paper for Aureli as early as about June of 1965. With bets being placed over the telephone without money changing hands at the time of the placement of a bet, it is not difficult to understand the purpose of buckets of water at a bookmaking site where dissolvable paper was used.

bacino began to make the daily telephone calls to Angelini's office to obtain the line. Sometimes he spoke to Angelini personally in that regard. While at the Lake Street location, Aureli introduced Bombacino to John DiDomenico whom he identified as the bookkeeper for defendants Cortina and Angelini. DiDomenico picked up the betting records from Aureli and Bombacino on a daily basis, and on Sundays he "hung around" the Lake Street book and took bets over the telephone.

Three or four weeks after the move to Lake Street, Aureli and Bombacino moved again to a new location at 6955 West Grand Avenue shortly after Aureli informed Bombacino that they would so move. The characteristics of the new site and its equipment were essentially the same as at the former location. A day or so after the move, Aureli introduced Salvatore (Sammy) Molose to Bombacino at the book, stating that Molose was a good friend of Cortina's and that Aureli was going to teach him "the business." Bombacino's duties remained the same, however.

On January 7, 1966, the date another bookkeeper named Andy Federenko was arrested, Aureli told Bombacino that they were going to the MGM Lounge to meet with Ferriola. They met Ferriola and Turello at the Lounge at about 7:30 p.m. Turello inquired of Aureli whether he knew anything about Federenko running an unauthorized book with Edward Bisacky that was taking in $50,000 per month. Aureli denied any such knowledge, and Ferriola instructed him to contact Federenko and determine whether he knew of any such book. The next evening Aureli told Bombacino that they were going to meet Federenko at the Division Street Bath House. They did so, and, in a conversation in the steam room, Federenko denied knowledge

of the book. Aureli expressed disbelief and stated to Federenko that he would have to answer to Ferriola since he had told Aureli to inquire of Federenko about the book. On January 10, Bombacino, Aureli, Manzella, Federenko and Ferriola met at a sausage stand, and Ferriola ordered Manzella to get Manzella's betting records for Ferriola's inspection. Ferriola further ordered Federenko to take no more bets and to turn over all his bets to Aureli.

Early in February, 1966, Aureli told Bombacino that the betting was getting too heavy so that the bettors could not get through to him on the telephone and that Cortina was looking for a new telephone. Bombacino offered to use his home telephone for receiving bets. Aureli said he would let Bombacino know as to whether that was acceptable, and within a day or two Aureli told him that he should get a telephone and that he "would be taking all out-of-town sports action at [his] home." Bombacino had a telephone installed at his apartment at 2540 North Mannheim Road and began booking at his apartment. His duties remained the same—Mondays only, pick up schedules from Angelini's office; daily transport Aureli from his apartment to his book at 6955 West Grand; daily get the line from Angelini's office; daily take bets over the telephone from about 11 a.m. to about 6 p.m.; and daily turn in betting records to DiDomenico in the evening. Bombacino received almost daily telephone calls from Nate Wigod, a "big bettor from Detroit."

Near the end of April, 1966, Aureli went to Miami, Florida for a week to ten days. During that period, he called Bombacino in Illinois every evening to inquire how the book had fared for the day.

During May or June, 1966, on the occasion of his taking some money to Angelini for Aureli, Bombacino had a con-

versation with Angelini in the latter's office. When Bombacino inquired as to how Angelini was doing, Angelini replied that he "didn't like baseball because it looks like [Angelini] was losing another $200,000 this year on baseball."

In the early part of June, 1966, Aureli told Bombacino that Aureli was going to move his book from 6955 West Grand to 6949 West Grand. Aureli stated that Molose would be working at home and that Bombacino would continue to take the out-of-town bets at his apartment.

Toward the end of July, Aureli was arrested for gambling at his book which had been moved from 6955 West Grand to 6949 West Grand. That evening, Aureli called Bombacino and, after some discussion, Aureli stated that the reason for the delay in getting out of jail was that Cortina "had a hard time getting hold of the attorneys." The following day, Aureli and Bombacino met Cortina at Meincher's Restaurant. At that time Cortina, stated, "We are going to give Frank Aureli a vacation at this time because he had already a couple of arrests for gambling and just got busted again; therefore, Sammy Molose will take the local sports action at his house, [Bombacino] will take the out-of-town action at [his] house, and [I'll] take the rest of the action at [my] place."

The evening of December 7, 1966, Bombacino was visited by Cortina and Aureli at Bombacino's apartment. Cortina told Bombacino that Molose had been arrested and that he was concerned that police might have found Bombacino's telephone numbers in Molose's home or in his possession. Cortina then suggested that Bombacino change his telephone numbers, which he did. Aureli continued to pay Bombacino's telephone bills.

On December 27, 1966, Bombacino was called by a man who identified himself as "Lefty." Pursuant to that conversation, Bombacino went the next day to Meo's Norwood House Restaurant at about noon. He was directed by the maitre d' to the back of the dining room where he recognized defendant Jack Cerone seated at a table with Paul DeLucia. Cerone said to Bombacino that he had been hearing nothing but favorable reports about Bombacino and that he had something in mind for him, but that he first had to talk to someone later on that day. He asked if Bombacino could meet him the next day at a bar called "The Leather Bottle" at 4 p.m., to which Bombacino replied he would. Cerone also stated to DeLucia that DeLucia knew Bombacino because Bombacino's brother used to make dietetic pastries for DeLucia. When Bombacino returned to his apartment, he called Aureli and told him of the conversation with Jack Cerone. Aureli replied, "Good. You're really getting up there."

The following day, Bombacino went to The Leather Bottle at the appointed time. He had a drink as he waited, and a few minutes after he arrived, a man who identified himself as "Lefty" came in and spoke to Bombacino. Bombacino then left the Leather Bottle and crossed the street, entering Armand's Pizzeria. There he saw Jack Cerone seated alone at a table in the back. Lefty went towards the bar in Armand's, leaving Cerone and Bombacino. Cerone told Bombacino he wanted him to service some big bettors in addition to those he had and that he wanted Bombacino to meet someone who would be in momentarily. A few minutes later, James Cerone came in. Jack Cerone began to introduce Bombacino to James, but James stated, "I know Lou for a long time." James Cerone sat down and told Bombacino that bettors would call him and iden-

tify themselves as "Goldblatt" with some initials which would enable James to identify them. Jack Cerone then placed a telephone call within the hearing range of those at the table and asked to speak to Joe Pep (Giancanna). He then said into the telephone, "Be sure to tell Joe Nick [Ferriola] to be at . . . Armand's" at 8 that night. Jack Cerone further stated to Bombacino that if he had any problems he was to straighten them out with James Cerone, or, that failing, to contact Jack Cerone through the pizza maker at Armand's. That evening, Bombacino reported the conversation to Aureli by telephone, prompting Aureli to exclaim, "Well, you will be making more money than I will."*

Bombacino returned to Armand's at 8 p.m., finding Jack Cerone and Ferriola already together there. Bombacino joined the two at a booth. Cerone started to introduce Bombacino to Ferriola, but Ferriola stated, "He has been with us a long time." Apparently nothing else transpired at that time.

Early in the evening about two weeks later, Bombacino again met with the Cerones at Armand's Pizzeria. Bombacino told Jack Cerone that "there was a lot of bookies being raided and [he] was a little on the shaky side because

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* In this connection it should be noted that Bombacino was being paid $200 per week plus an occasional bonus. He stated he picked up his and Aureli's pay envelopes each week at Chester and Bruno Sromek's Sinclair service station where such envelopes were stored in a safe. There was also evidence that Angelini, Cortina and Ferriola were seen on one or more occasions at the station or in the company of the Sromeks. The Sromeks were named in the indictment as unindicted co-conspirators. It is also noteworthy that, despite several changes in Bombacino's status and location, his basic rate of pay and the location at which he collected his weekly pay envelope never changed.

[he] was on probation." Jack Cerone replied that Bombacino should not worry because Cerone knew a judge who would take care of things if Bombacino were arrested. Jack Cerone and a companion then left, but Bombacino and James Cerone remained to review Bombacino's records of the week's "Goldblatt" bets. Subsequent to that conference, Jack Cerone would telephone Bombacino each evening, and Bombacino would turn over his records of that day's "Goldblatt" bets.

About March 14, 1967, Bombacino and Cortina met at the former's apartment and Cortina gave Bombacino some money to deliver to a local bettor of Aureli's who had come out ahead for the week. Bombacino made the delivery. On about the same date, Bombacino and Aureli also had a conversation at Bombacino's apartment. Aureli told Bombacino that there was a new system for taking bets whereby bettors would call Aureli and simply give their names to him, whereupon Aureli would telephone another man who, in turn, called the bettor to accept the bet. The record does not reveal whether Bombacino participated in the utilization of this new methodology.

Some time thereafter, Bombacino moved to a new apartment on Darryl Avenue where he continued to operate the book until late July or early August, 1967, when he received a telephone call from James Cerone in the early morning. James Cerone merely told Bombacino not to take any more bets and that no one would be calling him any longer and then hung up the telephone. Bombacino left Chicago in August of 1967.

The Government's case-in-chief included other evidence, testimonial, demonstrative and documentary, which is not related here and which tended to corroborate some of Bombacino's testimony.

The defendants' evidence was largely directed to an attack on the credibility of Bombacino. For example, the Sromeks testified that they never possessed or delivered envelopes at the request of defendants and that those of the defendants who had been in their service station from time to time were there to have their cars serviced. Federenko, Varlas, Kokas and Nicholas Kokenas (the owner of the MGM Lounge) testified in such manner as to place in dispute the veracity of certain meetings and other matters related by Bombacino. Peter Loquercio testified that his childhood friend, Joseph Ferriola, had acquired his nicknames of "Joe Nick" and "Joe Negal" as a child by the common practice in the Italian community of distinguishing boys whose first names were identical by adding the child's father's first name (in this case, Negal or "Nick") as a suffix to the boy's first name. Yolanda Bombacino's testimony tended to establish that she was married to Louis Bombacino and that he had deserted their marital home many years ago without the formality of a divorce and had become a bigamist, at best, or an adulterer.

Defendant Angelini offered testimony in his own defense. His testimony was directed to establishing the propositions that he was neither a gambler nor a conspirator to gamble; that his business was a legitimate one, at best, or, at worst, any illegality in it was an undiscovered legacy from a deceased partner who had started the business; and that he did not know Bombacino and had never participated in any of the conversations or meetings related by Bombacino.

I

Defendants challenge the sufficiency of the evidence to justify their convictions under several theories. They contend that the testimony of Bombacino was improperly admitted and that, without his testimony, there was no evi-

dence sufficient to convict them; that, even if Bombacino's testimony was properly admitted, there was insufficient evidence to convict; that, if there was evidence sufficient to establish their membership in a conspiracy with regard to gambling, there was insufficient evidence that the scope of the conspiracy included any anti-federal intent; and that the evidence established multiple conspiracies, some inherently local in nature, without establishing that any given defendant was a member of any anti-federal conspiracy. We disagree.

Defendants' argument that the testimony of Bombacino was inadmissible against them is essentially three-pronged. First, they assert that Bombacino, as a Government informer, did not possess the requisite intent to violate the law; since he was not a conspirator, therefore, they argue that his testimony should not have been admitted. This argument proceeds, however, on a basic misapprehension of the nature of Bombacino's testimony and of the co-conspirators exception to the hearsay rule. The defendants' argument would be valid if Bombacino had related extra-judicial statements made by *him* out of the presence of the defendants which were offered to prove the truth of the matters thereby asserted by Bombacino. *United States* v. *Morelbo*, 250 F.2d 631, 634 (2d Cir. 1957). But that was not the situation here. Bombacino's testimony was not a restatement of his own prior statements offered as tending to prove the truth of his assertions, but rather his testimony was that certain of the defendants had said and done certain things out of court and out of the presence of other defendants. Bombacino's testimonial role, thus, was identical to that of a recording device—hearing and seeing certain events, recording them in his memory and then, in effect, playing back the events through his testimony as they had occurred in his presence. Such extra-

judicial conversations with some defendants as had occurred out of the presence of other defendants constituted hearsay, it is true. However, extra-judicial statements and acts of co-conspirators occurring during a conspiracy and in furtherance of it have long been held to be competent evidence against their partners in crime under the ancient co-conspirators exception to the hearsay rule. *Clune* v. *United States*, 159 U.S. 590, 593 (1895); *Logan v. United States*, 144 U.S. 263, 308-09 (1892); *United States* v. *Jones*, 438 F.2d 461, 466 (7th Cir. 1971). Moreover, the district judge scrupulously instructed the jury during the presentation of Bombacino's testimony and at the close of the trial with regard to the limited applicability of the hearsay evidence prior to the jury's determination that the existence of the conspiracy and its membership had been proved. *United States* v. *Rizzo*, 418 F.2d 71, 82 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); *United States* v. *Hoffa*, 349 F.2d 20, 41 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966).

Secondly, defendants assert that admitting Bombacino's testimony violated the confrontation clause of the sixth amendment. However, in the plurality opinion of Mr. Justice Stewart in *Dutton* v. *Evans*, 400 U.S. 74 (1970), it is stated: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule [of exclusion] stem from the same roots. But this Court has never equated the two, and we decline to do so now." 400 U.S. at 86. *Dutton* held constitutional against a sixth amendment challenge a state statute which allowed the admission into evidence of hearsay statements of a defendant's co-conspirators made after the termination of the conspiracy but during the post-conspiracy period of concealment. Admittedly the federal co-conspirators exception is narrower than the statute there in question.

Lutwak v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). But the sixth amendment's confrontation clause applies to the states through the fourteenth amendment with no less vigor than is true of its application to federal prosecutions. *See Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). The refusal to equate the sixth amendment with the hearsay rule thus applies equally to federal and state prosecutions. Similarly, in *California* v. *Green*, 399 U.S. 149 (1970), the Court stated:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 399 U.S. at 155-56.

Defendants' rights under the confrontation clause of the sixth amendment were not violated.

Finally in this regard, defendants argue that it was error to admit the testimony of Bombacino as to extra-judicial declarations and acts of the defendants absent prior independent proof of the existence, scope and membership of the conspiracy. It is axiomatic that such declarations and acts of a co-conspirator may not be admitted in evidence against a defendant absent independent evidence establishing his participation in the conspiracy. *E.g. Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); *Oltman*

v. *Miller*, 407 F.2d 376, 378-79 (7th Cir. 1969); *United States* v. *Stadter*, 336 F.2d 326, 329 (2d Cir. 1964); *cf. Logan* v. *United States*, *supra*, at 144 U.S. 309. Defendants proceed from that well-established principle to assert that there was no such independent evidence here, or, in the alternative, that if there was independent evidence it was insufficient to validate the admission of Bombacino's testimony. These arguments miss the mark, for implicit in both is the assumption that all of Bombacino's testimony is admissible, if at all, under the co-conspirators exception to the hearsay rule. Even a casual reading of the record, however, reveals that much of Bambacino's testimony related extra-judicial admissions by word or act of a defendant which were properly admissible against that defendant. Although courts have admitted such evidence on the theory that the declarant's words or acts constituted an admission against interest, *e.g.*, *Opper* v. *United States*; 348 U.S. 84, 89-90 (1954), the better view is that such admissions are not hearsay at all and are admissible absent other reasons for exclusion. *E.g.*; C. McCormick, Handbook of the Law of Evidence § 239 (1954); 4 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1048 (1940); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Pa. L. Rev. 484, 488-93 (1937). As evidence, independent of the hearsay statement of a co-conspirator, such admission may quite properly constitute corroborative evidence sufficient to justify the admission of a co-conspirator's hearsay declaration.

Such independent, non-hearsay admissions were abundant in this case. Jack Cerone was implicated as a conspirator by his actions at Bombacino's initial meeting with him on December 28, 1966, when he told Bombacino that he had heard nothing but favorable reports about

him. James Cerone was shown to be a conspirator by his meeting with Jack Cerone and Bombacino on December 29, 1966, at which time he told Bombacino the methodology of taking the "Goldblatt" bets soon after Jack Cerone had told Bombacino he would be servicing some additional big bettors. Ferriola was connected with the conspiracy by his actions at Bombacino's initial contact with the conspiracy at the meeting on June 25, 1965, when Ferriola stated, "You go to work for Frank [Aureli], but be careful. There are a lot of G heat on the street." Angelini was identified as a conspirator by his exercise of command authority at the meeting on July 2, 1965, when he ordered Angelo Kokas to call in all bets of $50 or more to Aureli. Cortina also made clear his involvement in the conspiracy when he told Bombacino late in July of 1966 that Aureli was being given a "vacation" because of his several recent gambling arrests and then assigned Bombacino to taking "the out-of-town action" at his apartment. There was thus ample independent evidence that each of the defendants was a participant in a conspiracy involving alleged gambling. Accordingly, the statements and acts of each defendant were admissible against all defendants. *United States v. Hickey*, 360 F.2d 127, 140 (7th Cir.) *cert. denied*, 385 U.S. 928 (1966).

As for defendants' contention that the evidence against them was insufficient to justify their convictions, we have no doubt that the record before us discloses sufficient evidence from which the jury could properly have determined that there was one conspiracy as charged in Count One of the indictment, that all of the defendants were members of such conspiracy, that the scope of the conspiracy included the jurisdictionally necessary anti-federal element of conspiring to use facilities in interstate commerce, and that at least one overt act in furtherance

of the conspiracy occurred subsequent to its inception and during the period covered by the indictment. A review of the evidence reveals that the conspiracy was characterized by a clearly defined hierarchy in which Bombacino was at, or near, the bottom and subject to the orders of all the defendants. From such a vantage point, Bombacino's ability to observe the workings of the conspiracy was restricted, but, due to the apparent trust placed in him as a rising minion or, perhaps, to an overabundance of confidence, the defendants readily revealed their respective positions in the conspiracy, as well as its scope, to Bombacino by their words and deeds. From the evidence adduced at trial, we are satisfied that the jury could properly have determined that the defendants' guilt was established beyond a reasonable doubt.

Defendants contend further, however, that proof of specific knowledge of the use of facilities in interstate commerce is essential to a conviction for conspiring to violate 18 U.S.C. § 1952 and that there was no proof of such knowledge as to any of them adduced at trial. The Government asserts, on the other hand, that proof of specific knowledge of the use of facilities in interstate commerce is not essential to a conviction for conspiracy to violate section 1952, citing *United States* v. *Hanon*, 428 F.2d 101 (8th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971), and *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), which squarely held such proof is not required. However, we need not decide whether the *Hanon-Roselli* rule should be followed in this circuit, for we are convinced that this record contains ample proof of the knowledge of each of the defendants that the use of facilities in interstate commerce was included within the scope of the conspiracy. We believe the jury could properly have found from the evidence, as it did, that all defendants had conspired to use such facilities for illegal gambling.

The proof in this case established that Bombacino, as the underling he was, was moved from place to place several times and was subjected to changes of duties at the whim of the defendant. The evidence adduced clearly proves that Bombacino was subject to the orders of each of the defendants, and, moreover, was paid the same amount from the same source regardless of the nature of his duties, the location of his place of business, or the identity of his apparent superiors. The evidence is also unequivocal that shortly after Bombacino was received as a co-conspirator he began to receive telephone calls from out-of-state bettors without any evidence whatever that he had solicited such business in any way. And it is also clear that Bombacino continued to receive such out-of-state telephone calls without interruption regardless of changes in the nature of his duties, the location of his place of business, the identity of his apparent superiors, and even without regard for changes in his telephone numbers on little advance notice, all without evidence of Bombacino's having communicated such changes to out-of-state bettors. Given such evidence and in light of other competent evidence of the hierarchal nature of the conspiracy and the constant exchange of information among the conspirators, we believe the jury was entitled to conclude that out-of-state telephone calls from bettors were induced by the defendants originally and that changes in Bombacino's scope of operation, his location and his telephone numbers were transmitted to out-of-state bettors by the defendants or by others at their direction. Consequently, we conclude that there was ample evidence that all of the defendants were aware of the anti-federal element of the conspiracy and participated in it.

Defendants' additional argument that multiple conspiracies were proved under Count One is predicated upon the

unlikely theory that each time Bombacino's duties or locus of operation changed a new conspiracy was revealed. The evidence belies that theory, especially the evidence that Bombacino's compensation remained the same despite such changes, and we reject that argument as well.

Thus we are satisfied that the evidence adduced at trial, viewed in the light most favorable to the Government, amply supports the jury's verdict that all of the defendants were guilty as charged in Count One of the indictment.

II.

Defendant Angelini argues that 18 U.S.C. § 1952 is unconstitutional as violative of the first, sixth and ninth amendments to the Constitution, as well as attacking its application to him as constituting an ex post facto law forbidden by article one, section nine, clause three of the Constitution. We hold that each of these contentions is without merit.

Angelini's first amendment argument is, in essence, that, since newspapers and other media frequently report predictions as to the outcomes of various athletic events—indeed, some of which are similar to or based upon Angelini's computation of odds and point spreads—and such communication is protected by the first amendment, Angelini's telephonic communication of such information is similarly protected. We rejected such an assertion in *United States* v. *Lookretis*, 385 F.2d 487, 489 (7th Cir. 1967), *vacated on other grounds*, 390 U.S. 338 (1968), and we again reject it. Angelini's first amendment claim erroneously proceeds on the implicit assumption that the known use and purpose of communication is not relevant to the determination of whether the communication may be prohibited consistent with the first amendment. It is clear that speech or conduct ordinarily protected by the

Constitution may lose that protection because of the intent of the speaker or actor or the context within which it occurs. *E.g., Ginzburg* v. *United States,* 383 U.S. 463 (1966). The communication of opinions as to the outcome of future athletic contests may not threaten valid community interests in other contexts, but such communication clearly threatens legitimate community interests when it occurs as a part of an illegal gambling operation crossing state boundaries.

Angelini's assertion that section 1952 violates the sixth amendment in that it is so vague that persons of common understanding are not adequately advised of what it is that is proscribed similarly lacks merit. In *United States* v. *Zizzo,* 338 F.2d 577, 579 (7th Cir. 1964), *cert. denied,* 381 U.S. 915 (1965), we squarely held that section 1952 was constitutional against a challenge on the ground that it was vague. We reaffirm that holding.

As a further ground for his assertion that section 1952 is unconstitutional, Angelini argues that the statute "enlarg[es] a state statute in violation of the ninth amendment." The gist of this argument is that section 1952 was meant to aid the states in the enforcement of their criminal statutes where facilities in interstate commerce were used in the violation of such statutes; that the statute the enforcement of which is here being aided, Illinois Revised Statutes, Chapter 38, Section 28-1 (a), is subject to a statute of limitations of eighteen months; and that section 1952 incorporates the statute of limitations of the state statute it is aiding. Ergo, Angelini argues, since this prosecution was not commenced within the eighteen month limitation period, the convictions must be reversed. However, as Mr. Justice Clark, sitting on this court, stated in *United States* v. *Karigiannis,* 430 F. 2d 148, 150 (7th Cir.), *cert. denied,* 400 U.S. 904 (1970):

> [T]he gravamen of a charge under § 1952 is the violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage." [Citing *United States* v. *Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970).]

Thus the fact that the illegal activity in furtherance of which facilities in interstate commerce were used could not be prosecuted under state law because of Illinois' statute of limitations is irrelevant to a prosecution under 18 U.S.C. § 1952. Indeed, as we held in *United States* v. *Rizzo*, 418 F.2d 71, 80 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970), proof of the violation of the state statute to which reference is made for purposes of prosecution under 18 U.S.C. § 1952 is not an essential element to be proved in such a federal prosecution. State law thus serves merely a definitional purpose under section 1952. That being the case, section 1952 does not enlarge state criminal statutes at all because it punishes the use of facilities in interstate commerce in furtherance of enterprises violative of state statutes; it does not punish substantive violations of the state statutes per se. Section 1952, therefore, does not "enlarge a state statute in violation of the ninth amendment" as contended by Angelini.

Angelini's final attack on the constitutionality of section 1952 is the assertion that it constitutes an ex post facto law violative of article one, section nine, clause three of the Constitution. The theory of this argument is that section 1952 on its face proscribes the use of interstate facilities in any form in furtherance of gambling, thereby rendering it violative of the first amendment by Angelini's lights; that the statute was not narrowed to constitutionally permissible scope until *Angelini* v. *Illinois Bell Tel. Co.*, 418 F.2d 111 (7th Cir. 1969), *cert. denied*, 397 U.S.

1040 (1970), limited its application to rapid transmission of gambling information; and that such limitation did not occur until after the conduct which gave rise to this prosecution had occurred. Taking Angelini's argument at face value, we do not find the limiting construction of section 1952 to be an unreasonable interpretation of the statute which, if such were the case, might provide an arguable basis for his ex post facto law assertion. *Williams* v. *United States*, 179 F.2d 644, 647 (5th Cir. 1950). 18 U.S.C. § 1952 does not constitute an ex post facto law as applied here.

III.

Defendants also assert that certain procedural or trial errors require the reversal of their convictions. They argue that the district court should have ordered production of the minutes of the grand jury which led to an indictment which was subsequently superseded by a second indictment upon which this trial proceeded; that the district court improperly limited defendants' discovery of certain evidence of electronic eavesdropping; that the district court erred in admitting certain testimony of the United States Attorney; that the prosecutor's conduct, especially in final argument, was improper and prejudicial, and that such defects were uncured before verdict; that the trials of these defendants should have been separate for one or more reasons; that the divulgence of certain telephone toll call records to the Government violated 47 U.S.C. § 605; and that the seizure and introduction into evidence of certain unopened mail discovered in Angelini's office was improper. We find each of these arguments to be without merit.

Production of the minutes of the proceedings of the grand jury which returned the original indictment in this case was not necessary, nor, we believe, would it have been helpful to the defendants. Grand jury minutes are not

available as of course to defendants in federal criminal trials, but rather may be made available in the exercise of the trial court's discretion when the defense has shown that "'a particularized need' exists for the minutes which outweighs the policy of secrecy [of the grand jury's proceedings]." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). Here, the initial indictment was based upon the testimony of an agent of the FBI who testified as to the contents of Bombacino's reports to that agency. Bombacino himself did not testify at all at the first grand jury proceeding which related to this cause. Although the first indictment named only Jack Cerone, Aureli and Angelini as defendants and the superseding indictment added James Cerone and Ferriola as additional defendants, that disparity does not supply the "particularized need" showing required by *Pittsburgh Plate Glass Co.* The agent's testimony which led to the first indictment was based on Bombacino's statements to various FBI agents, copies of all of which statements were given to defendants in the course of the trial. The minutes of the first grand jury proceeding thus could not be useful either for impeachment or cross-examination purposes, for the defendants had at their disposal the best evidence of what was the basis of the charges against them under both indictments. In addition, the trial court compelled the production of the minutes of the second grand jury proceedings. Defendants were not entitled to more.

Ferriola contends that the disclosure of electronic eavesdropping required by the district court was insufficient and prejudiced his ability to eliminate illegally obtained evidence from the trial. That contention is groundless. The Government provided Ferriola with copies of "logs" of all illegally overheard conversations in which he was identified as a participant. It was also established that

nothing illegally overheard as revealed in such logs was relevant to this trial; and, in addition, the district court examined in camera a voluminous sheaf of logs containing reports of unidentified voices overheard and found that none of such logs was relevant to this trial. Indeed, it was established that "every time there was a possibility" in the view of the overhearing agent that Ferriola was present at an illegally overheard conversation the fact was recorded, and logs of all such occasions were made available to him. Moreover, Ferriola made no showing of his standing to object to any illegally overheard conversations other than those as to which logs were provided him. The trial court thus committed no error in its management of Ferriola's discovery of evidence obtained by illegal eavesdropping.

Defendants also assert that the district court erred in admitting the testimony of the then United States Attorney, who was not personally prosecuting this case. They argue that the presence of the United States Attorney as a witness for the prosecution was prejudicial because of the prestige of his office; that his testimony was not properly admitted as rebuttal testimony to controvert the testimony of defendants' witness Kokenas; and that, while the fact of his testifying was itself prejudicial, his testimony that Kokenas expressed fear of "those fellows" was unduly prejudicial, and its admission served no legitimate purpose. As to the awesome-office theory, we do not agree that the mere fact that a witness holds an office of public trust should disqualify him as a witness if he would otherwise be able to offer relevant, competent and material evidence as to any issue in a trial. Defendants offered Kokenas as a witness apparently to create the impression in the jurors' minds that the prosecutors had withheld from the grand jury and defense counsel evidence favorable to defendants. On direct examination, Kokenas, who owned

the MGM Lounge, testified that Ferriola never met anyone or ate in the Lounge but sometimes came in to pick up carry-out food, thus contradicting the Government's evidence of the meeting held there on June 26, 1965. He also testified that he had told the Government the same thing when they questioned him and that a meeting with the United States Attorney in the offices of his former law firm had not been suggested by him in any way. The United States Attorney testified in rebuttal that Kokenas had said that he had seen Ferriola, Turk Turello, Angelo Kokas and Aureli together in the Lounge at times, but didn't know if they were there on June 26, 1965. He also testified that Kokenas had said that he couldn't talk to anyone in the federal building, stating, "I can't talk to you here. Those fellows can't know that I am talking to you." He testified that Kokenas had said he was willing to talk to him in some place other than the federal building. It is clear, therefore, that there was direct contradiction between Kokenas' testimony and that of the United States Attorney. It is also clear that evidence of his fear may be presented as a means of demonstrating a witness' bias, thereby tending to discredit him. *United States* v. *DeLutro,* 435 F.2d 255, 256-57 (2d Cir. 1970); *United States* v. *Schennault,* 429 F.2d 852, 855 (7th Cir. 1970). As for defendants' argument that they were prejudiced by the failure of the United States Attorney to identify which, if any, of the defendants Kokenas was afraid of, we conclude that defendants waived that issue by failing either to cross-examine the United States Attorney or to call Kokenas in surrebuttal on that point. *United States* v. *Cook,* 432 F.2d 1093, 1101-02 (7th Cir. 1970), *cert. denied,* 401 U.S. 996 (1971).

Defendants further claim that the conduct of the prosecutors was prejudicial, both during the trial-in-chief and during the Government's closing argument. Defendants

cite several incidents of allegedly prejudicial conduct as being sufficiently damning as to require reversal. Having carefully reviewed the entire record of this trial, however, we do not believe that any such incident or series of incidents cited by defendants deprived them of a fair trial. It is true that in the heat of trial the prosecutors made occasional rash statements which were to some degree improper. However, the district judge rectified such problems by appropriate admonitions to counsel and the jury, and the offending prosecutor apologized, sua sponte and in the presence of the jury, to the court and counsel for one such inappropriate comment. As Judge Learned Hand stated in *United States* v. *Wexler*, 79 F.2d 526, 529-30 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936):

> It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction. The question is always as to the particular incident challenged, in the setting of the whole trial.

We hold that the prosecutors' conduct, in the context of the whole trial and in view of the district judge's scrupulous policing of arguable improprieties, was not prejudicial.

Defendants also assert as error the failure of the district court to sever the trial of each defendant. It is well established that a district court's denial of motions for severance may constitute reversible error "only if prejudice is so clearly shown that refusal of a severance is an abuse of discretion." *United States ex rel. Durso* v. *Pate*, 426

F.2d 1083, 1089 (7th Cir. 1970), *cert. denied,* 400 U.S. 995 (1971). No such showing of prejudice has been made here.

Angelini argues that the disclosure to the FBI by the telephone company of its toll call records with regard to telephones listed to Bombacino, Sammy Molose, Model Construction Company (a fictitious company in whose name the telephone was answered at the 6955 West Grand Avenue book) and Frank A. DeSoto (Aureli's alias at the 4355 South Sawyer book) violates 47 U.S.C. § 605. He makes the same argument with regard to the disclosure to the FBI by the management of the Washington Pines Hotel, one of Aureli's residences, of similar records with regard to the telephone in Aureli's room. Assuming that Angelini has standing to interpose this objection, we agree with the determination of the Second Circuit in *United States* v. *Covello,* 410 F.2d 536, 541-42 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969), that such records made and maintained in the ordinary course of business for accounting purposes are properly to be accorded the same evidentiary treatment as the records of other businesses and are without the scope of section 605. Such disclosure as occurred here did not violate 47 U.S.C. § 605.

Angelini also contends that the seizure of certain unopened mail discovered in his office upon the execution of valid search warrants was illegal. He also contends that the opening of one such envelope addressed to John DiDomenico in care of Angelini's firm and the introduction into evidence of the envelope itself was improper. We determined that the search and seizure was proper in *Angelini* v. *Illinois Bell Tel. Co.,* 418 F.2d 111, 115 (7th Cir. 1969), *cert. denied,* 397 U.S. 1040 (1970), when Angelini's counsel specifically raised the issue of the propriety of the seizure of a number of items, including the unopened

mail. Angelini cites no convincing reason to disturb that determination, and we shall not do so. His contention with regard to the opening of the DiDomenico letter is vague and unpersuasive, especially in view of the fact that the contents of the envelope were not offered in evidence. We find no error.

IV.

Finally, Angelini raises several challenges which relate only to the validity of his convictions. He asserts that Count Three of the indictment was insufficient to charge an offense and that, if it was, the evidence was insufficient to convict him on that count; that it was improper to permit the use in this case of his testimony in a prior civil proceeding to compel the Government to have his telephone service reinstated after it had been terminated pursuant to 18 U.S.C. § 1048(d); and that the Government's trying him on Count Three after having terminated his telephone service pursuant to 18 U.S.C. § 1084(d) subjected him to double jeopardy.

Angelini's argument that Count Three of the indictment is inadequate to charge to offense is without merit. He bases his argument on the theory that an indictment charging a substantive violation of 18 U.S.C. § 1952 must recite the particulars of the use of the interstate facility charged. The indictment recited all of the necessary elements of the offense. *See Turf Center, Inc.* v. *United States;* 325 F.2d 793, 796 (9th Cir. 1963). It did omit the opposite pole of the use of an interstate facility, stating only that the United States mail was used "in interstate commerce" "at Chicago, Illinois" on or about a certain date. However, the question of the location of the other terminal of the use is in the nature of evidentiary matter to be dis-

covered by a motion for a bill of particulars. *Carbo* v. *United States*, 314 F.2d 718, 731-33 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The additional information desired by Angelini was supplied by the Government in its bill of particulars provided pursuant to his motion. We hold that Count Three of the indictment was sufficient to charge an offense under 18 U.S.C. § 1952.

Angelini's challenge to the sufficiency of the evidence to convict him on Count Three is based chiefly on two theories: that, since the use of the mails was an out-of-state customer's mailing a payment to him, he did not use the mails and that there is no evidence negating the possibility that the payment to Angelini was for printed schedules sold to the general public and not for providing the line. There was evidence before the jury that the customer had paid Angelini $350 for a football season's service and that the printed publication Angelini distributed cost $.25 per copy per week. There was no evidence that the customer subscribed to more than one copy per week; indeed the evidence was that he subscribed for his personal use alone. We believe the jury was entitled to infer arithmetically that much of the $350 fee was for the line provided by Angelini, especially in view of the fact that the evidence established that the customer called Angelini as frequently as a dozen times a week. Therefore, even if we assume that Angelini's printed materials were not prohibited from interstate distribution, the evidence was sufficient to establish that Angelini made use of the mails to distribute the line to his out-of-state customer who also made use of the mails in paying for Angelini's services. The evidence of guilt under Count Three was adequate.

The contention is also meritless that introduction in this trial of Angelini's prior testimony in the suit he

filed to reinstate his telephone service terminated pursuant to 18 U.S.C. § 1084(d) violated his fifth amendment privilege against self-incrimination. As clearly held in *Telephone News Sys., Inc.* v. *Illinois Bell Tel. Co.*, 220 F.Supp. 621, 628 (N.D. Ill. 1963) (three-judge court), *aff'd mem.*, 376 U.S. 782 (1964), the Government has the burden of proving the propriety of termination in a suit brought to compel the reinstatement of telephone service terminated pursuant to section 1084(d). As the court there said regarding such actions, "[P]laintiff is at no point required to come forward with evidence, much less testimony, until defendant has satisfied this burden. Even then, a plaintiff is not required to take the stand or incriminate himself." In Angelini's civil suit for restoration of his telephone service, he was called as an adverse witness by the Government pursuant to Rule 43(d) of the Federal Rules of Civil Procedure. Upon objection by Angelini's counsel, the Government attorney correctly stated to Angelini that his fifth amendment privilege was available to him. Angelini did not assert his privilege and testified *both* as an adverse witness on behalf of the Government and as a rebuttal witness on his own behalf. Angelini thus waived his fifth amendment privilege without compulsion by the Government since, as is stated above, it was the Government, not Angelini, who had the burden of proof in the section 1084(d) suit.

Angelini also argues that termination of telephone service pursuant to 18 U.S.C. § 1084(d) followed by prosecution for violation of 18 U.S.C. § 1952 arising out of the same conduct violates the prohibition against double jeopardy under the fifth amendment. However, as the Supreme

Court said in *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute there in question] imposes a criminal sanction. That question is one of statutory construction.

Here, the question therefore becomes whether 18 U.S.C. § 1084(d) imposes a criminal sanction. It is clearly established that section 1084(d) is nonpenal in intent and does not impose criminal sanctions. *Telephone News Sys., Inc.* v. *Illinois Bell Tel. Co., supra*, 220 F.Supp. at 628-33. Angelini has not been subjected to double jeopardy for the same offense.

The judgments of the district court are affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 15, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18551, 18555, 18622, 18635 vs.

JAMES CERONE, JOHN PHILIP CERONE, SR., JOSEPH FERRIOLA, DONALD J. ANGELINI, and DOMINIC CORTINA,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, November 9, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18622 vs.

DONALD J. ANGELINI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

APPENDIX "D"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

2. Opinion Filed September 15, 1971 (in # 18551, 18555, 18622, & 18635)
3. Judgment Entered September 15, 1971 (in 18551, 18555, 18622, & 18635)
4. Appellant's Petition For Rehearing En Banc And Petition For Rehearing Filed November 3, 1971: (18622 only)
5. Order Entered November 9, 1971 Denying Appellant's Petition For Rehearing En Banc & Petition For Rehearing.

Cause No. 18622

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DONALD J. ANGELINI,

Defendant-Appellant.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of November A.D. 1971.

William H. Pittman
William H. Pittman
Clerk of the United States Court of Appeals
for the Seventh Circuit.

Nos. 71-720, 71-759 and 71-760

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
JAN 31 1972
E. ROBERT SEAVER, CLERK

JOHN PHILIP CERONE, SR. AND JAMES CERONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

DOMINIC CORTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-720

JOHN PHILIP CERONE, SR. AND JAMES CERONE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 71-759

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-760

DOMINIC CORTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petition-

455-751—72——1

ers and a co-defendant, Ferriola,[1] were convicted of having conspired to violate 18 U.S.C. 1952 with respect to illegal gambling. Petitioner Angelini was also convicted of one substantive violation of 18 U.S.C. 1952. They were each sentenced to five years' imprisonment and fined $10,000 on the conspiracy count (the fine was suspended with respect to petitioner Cortina); petitioner Angelini was also sentenced to five years' imprisonment and a $10,000 fine on the substantive count, both to be concurrent with his sentence under the conspiracy count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).[2]

The government's case against petitioners was based primarily on the testimony of a government informer, Louis Bombacino. The evidence, which is summarized in the opinion below (Pet. App. A2–11), showed essentially that Bombacino had worked as a bookmaker in a gambling syndicate in which petitioners were part of the hierarchy. Under the direction of petitioners, Bombacino accepted bets on sporting events by telephone, including some interstate calls. Bombacino identified each of the petitioners and indicated their knowledge and direction of the conspiracy by relating various meetings involving each of them.

1. All of the petitioners contend[3] that the co-conspirator exception to the hearsay rule constitutes a

[1] Ferriola has filed a motion in this Court seeking an extension of time within which to file his petition for certiorari. The case of another co-defendant, Aureli, was severed during trial.

[2] Pet. App. refers to the appendix in the petition of John and James Cerone.

[3] Cerone Pet., Point 1, Cortina Pet., Point 1, and Angelini Pet., Point 8.

denial of their rights of confrontation under the Sixth Amendment. In addition to the arguments advanced below and rejected by the court of appeals (Pet. App. A 11–16), petitioners here claim that the dismissal of the writ of certiorari in *Bostic* v. *United States*, 402 U.S. 547, indicates that the hearsay exception for statements of co-conspirators is no longer valid. This is incorrect. The Court's statement of its reasons for dismissal of the writ in *Bostic* shows that, in granting certiorari, the Court had erroneously assumed that the case presented an issue as to whether a person who had been removed from the conspiracy by his arrest could be held responsible for substantive crimes later committed by co-conspirators, which had not been within the contemplation of the conspiracy at the time of arrest. The dismissal of the writ had nothing whatsoever to do with the evidentiary rules relating to co-conspirator statements. As pointed out by the court below (Pet. App. A 13–14), the decision in *Dutton* v. *Evans*, 400 U.S. 74, upholding the right of the states to adopt a co-conspirator rule broader than that of the federal courts, recognized that the traditional co-conspirator exception to the hearsay rule did not violate a defendant's right of confrontation.

2. Petitioners John and James Cerone also contend that their conspiracy convictions should be reversed because there was no direct proof that they had knowledge of the interstate aspects of the conspiracy (Cerone Pet., Point 3). They claim that the government conceded below that they had no such knowledge (Cerone Pet. 21). This is incorrect. The full

sentence from the government's brief (p. 62), which petitioners only partially quoted makes clear that the government's "concession" was on an *arguendo* basis:

> Even if we were to agree that some of the defendants had no knowledge of the conspiracy's interstate activities, it does not follow that the evidence is insufficient to sustain the verdict on Count I.

The government's *arguendo* position below was that a particular conspirator need not have knowledge of the interstate aspect of the activities for his conviction of conspiracy to violate 18 U.S.C. 1952 to be valid. *United States* v. *Roselli*, 432 F. 2d 879, 891–892, (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8), certiorari denied, 402 U.S. 952. It is, however, unnecessary to rely upon this proposition here. The trial court charged the jury that knowledge that interstate telephone lines or mails would be used as part of the conspiracy was a necessary element of the offense with respect to each defendant (Tr. 2161). The jury thus necessarily found that the Cerones had such knowledge and the court below properly concluded that there was "ample evidence" to support this finding (Pet. App. A 17–18).

3. Petitioner Cortina contends that the trial court erred in allowing the government informer, Bombacino, to testify that he had contacted the F.B.I. after certain meetings (Cortina Pet., Point 2). Cortina claims that evidence of these contacts raised an in-

ference that Bombacino made reports at those times which would constitute inadmissible, prior consistent statements. Since there was no testimony as to what, if anything, was said in these contacts, there was clearly no error in permitting the testimony.[4]

4. Petitioners' other contentions were fully answered in the opinion of the court of appeals on which we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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[4] The court of appeals found it unnecessary to comment on this allegation of error.

U.S. GOVERNMENT PRINTING OFFICE 10/2